

Federal Court



Cour fédérale

**Date: 20131203**

**Docket: IMM-12781-12**

**Citation: 2013 FC 1210**

**Toronto, Ontario, December 3, 2013**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**AIMÉ-LANDRY AHISHAKIYE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Overview**

[1] Due to mischaracterization of fact based on confusion in respect of the Applicant's testimony, which led to the Refugee Protection Division's error of fact in its credibility findings, the Court does not find the decision is reasonable when assessed as a whole in context.

## II. Introduction

[2] The Applicant seeks a judicial review of a decision by the RPD of the Immigration and Refugee Board, dated November 6, 2012, wherein, it was determined that the Applicant was not a Convention refugee under section 96 nor a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA].

## III. Background

[3] The Applicant, Mr. Aimé-Landry Ahishakiye, is a young Tutsi from Bujumbura, Burundi.

[4] In early 2010, the Applicant became a student at the Hope Africa University. At the university, the Applicant indicates he made friends with a number of students who supported the National Forces of Liberation [NFL] political party of Burundi.

[5] The Applicant explains that these students began pressuring him to join the party in April 2010. Despite declining numerous offers, they continued to pressure him to join for months.

[6] In May 2010, the Applicant submitted a visa application to come to Canada to study at the University of Sherbrooke. This visa was denied as classes had already begun when his application was reviewed by the Canadian Embassy.

[7] On September 24, 2010, the Applicant states that one of the students who had asked him to join the NFL approached him and demanded that the Applicant join the party, forcefully handing him a membership card. That same evening, the Applicant states he received a threatening

telephone call from the same student and he continued receiving such calls until shortly before his departure to Canada.

[8] On September 27, 2010, the Applicant stopped attending classes at the Hope Africa University. The Applicant states he feared leaving his home as a result of the threatening telephone calls.

[9] On December 16, 2010, the Applicant received a student visa to study at the University of Sherbrooke. The Applicant subsequently left Burundi for Canada on December 29, 2010.

[10] On January 5, 2011, the Applicant submitted a refugee claim in Etobicoke, Ontario. The Applicant did not attend the University of Sherbrooke after his arrival.

[11] On November 6, 2012, the RPD rendered a decision that the Applicant was neither a Convention refugee nor a person in need of protection.

#### IV. Decision under Review

[12] In its decision, the RPD determined that the Applicant was not credible and that he had not established a serious possibility of persecution or that he would be personally subject to a risk to his life or cruel and unusual treatment or punishment in Burundi.

[13] In assessing the Applicant's credibility, the RPD found it implausible that the Applicant's parents would have taken the matter "lightly", as testified by the Applicant, when informed by their 19 year old son that he was being threatened by other students.

[14] The RPD noted that his parents would have reasonably been expected to have contacted the school administration where their son had experienced the recruitment efforts of the NFL. The RPD found that this lack of action on the part of the Applicant's parents greatly put into question the credibility of his testimony.

[15] In addition to its finding regarding the credibility of the Applicant, the RPD noted that the objective evidence on file did not demonstrate that he fit the profile of those generally targeted by the NFL, or that the party was engaged in recruiting members against their will. The RPD therefore concluded that objective evidence did not establish the existence of a serious possibility of persecution or risk to his life or cruel and unusual treatment or punishment.

#### V. Issue

[16] Is the RPD's decision reasonable?

#### VI. Relevant Legislative Provisions

[17] The following legislative provisions of the *IRPA* are relevant:

##### **Convention refugee**

**96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race,

##### **Définition de « réfugié »**

**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du

religion, nationality, membership in a particular social group or political opinion,

fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

#### **Person in need of protection**

#### **Personne à protéger**

**97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk,

(i) elle ne peut ou, de ce fait, ne veut se réclamer

unwilling to avail  
themselves of the protection  
of that country,

de la protection de ce  
pays,

(ii) the risk would be  
faced by the person in  
every part of that country  
and is not faced generally  
by other individuals in or  
from that country,

(ii) elle y est exposée en  
tout lieu de ce pays alors  
que d'autres personnes  
originaires de ce pays ou  
qui s'y trouvent ne le  
sont généralement pas,

(iii) the risk is not inherent  
or incidental to lawful  
sanctions, unless imposed  
in disregard of accepted  
international standards,  
and

(iii) la menace ou le  
risque ne résulte pas de  
sanctions légitimes —  
sauf celles infligées au  
mépris des normes  
internationales — et  
inhérents à celles-ci ou  
occasionnés par elles,

(iv) the risk is not caused  
by the inability of that  
country to provide  
adequate health or  
medical care.

(iv) la menace ou le  
risque ne résulte pas de  
l'incapacité du pays de  
fournir des soins  
médicaux ou de santé  
adéquats.

**Person in need of protection**

**Personne à protéger**

(2) A person in Canada  
who is a member of a class of  
persons prescribed by the  
regulations as being in need of  
protection is also a person in  
need of protection.

(2) A également qualité  
de personne à protéger la  
personne qui se trouve au  
Canada et fait partie d'une  
catégorie de personnes  
auxquelles est reconnu par  
règlement le besoin de  
protection.

**VII. Position of the Parties**

[18] The Applicant raised various grounds to support his position that the RPD's decision is not reasonable, all of which are related to how the RPD assessed the evidence on file.

[19] Firstly, the Applicant contends that the RPD erred in misconstruing his testimony. The Applicant states that the RPD confused two conversations he had with his parents regarding the actions of the NFL towards him; his initial conversation with regard to being approached by members of the NFL, and the second, a conversation in which he revealed he had been threatened by them.

[20] The Applicant submits that in misconstruing this evidence and drawing a negative credibility finding from it, it is not possible to know for certain how the RPD would have judged the case otherwise.

[21] The Applicant submits that the RPD also misconstrued the evidence on record regarding the recruitment pattern of the NFL. The Applicant states that the evidence in fact demonstrates that the NFL did rely on violence to recruit new members in 2010, primarily through youth partisans.

[22] The Applicant further submits that the RPD erred in finding that his testimony regarding his parents' reaction to the threats made by the NFL was implausible. The Applicant states that he clearly testified that the university's security service was non-existent; therefore, his parents cannot have reasonably been expected to communicate with it regarding their son's safety. Moreover, the Applicant states that once the RPD accepted that the Police in Burundi were not reliable, there was no logical basis for the RPD to expect the Applicant to go to the university to resolve the problem.

[23] Lastly, the Applicant argues that the RPD breached a principle of natural justice by basing its credibility findings on a doubt which was not put to the Applicant. Specifically, the Applicant

states that the RPD erred in making a determination regarding the Applicant's father's political views without first asking him directly if he was a supporter of the CNDD-FCC.

[24] The Respondent argues that the RPD was entitled to find that the Applicant's account of events was not credible, and did not err by ignoring evidence of the atrocities committed by the NFL in Burundi at that time. To the contrary, the Respondent submits that the RPD did not have any evidence before it to support the Applicant's claims of forcible and threatening recruitment efforts by the NFL.

[25] The Respondent further submits that the RPD did not err in its assessment of the Applicant's evidence of his parents' reaction to the threats by the NFL. The Respondent argues that the Applicant's claim that the RPD confused the two conversations discussed by the Applicant in his testimony is self-serving and attempts to explain away the testimony that it questioned. Further, the Respondent asserts that the RPD was entitled to find it not credible that the Applicant would simply drop out of school without approaching authorities for assistance.

[26] With regard to the Applicant's claim that the RPD breached a principle of fundamental justice, the Respondent submits that the RPD did not make a determination that his father was politically active, or that he was a CNDD-FDD partisan or supporter. The RPD simply found that he was in a position that was approved by the government in power.



### VIII. Standard of Review

[27] The applicable standard for issues involving the RPD's weighing of evidence or findings of credibility is the standard of reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at para 4).

[28] The decision must therefore be justifiable, transparent and intelligible. It should be vacated only if it is perverse, capricious, not based on the evidence or based on an important mischaracterization of material facts (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[29] The Applicant also alleges that the RPD breached a principle of natural justice. The appropriate standard of review for issues involving procedural fairness and natural justice is the standard of correctness (*Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392 at para 46).

### IX. Analysis

[30] In the Court's view, the Applicant has demonstrated that the RPD based its decision on a negative credibility finding that was made due to confusion in respect of the testimony, and, thus, on the basis of the narrative, itself.

[31] In its decision, the RPD relied largely on the Applicant's account of his parents' reaction regarding the threats by the NFL in determining that his story was not credible. The RPD concluded:

[18] Le demandeur a expliqué qu'il ne s'était pas adressé à la police parce que la police n'est pas fiable. Il est évident au regard de la preuve documentaire que la

population n'accorde aucune confiance aux forces de sécurité. Le tribunal considère raisonnable que le demandeur se soit abstenu de faire appel à la police.

[19] Cependant, lorsque le tribunal a demandé au demandeur s'il avait tenu ses parents au courant des pressions exercées sur lui pour qu'il rejoigne le FNL, le demandeur a répondu que oui, mais que ses parents avaient pris ses révélations à la légère. Le tribunal juge peu probable, voire invraisemblable, que les parents du demandeur aient pris à la légère les révélations du demandeur que le FNL cherchait à le recruter contre son gré. Le demandeur lui-même a insisté dans son exposé circonstancié qu'il avait ressenti de l'inquiétude face à la possibilité d'être mépris par les forces de sécurité pour un membre du FNL, un mouvement que le demandeur qualifie de mouvement rebelle dans son exposé circonstancié. [Emphasis added].

[32] As described above, the Applicant asserts that the RPD, inadvertently confused two separate conversations he had with his parents to arrive at this conclusion. Conversely, in its memorandum, the Respondent argues that these two conversations are one and the same event, and that the Applicant is merely attempting to invent a temporal distinction in the facts.

[33] The Court cannot agree with the Respondent's suggestion. As it clearly appears from the transcript of the hearing (Certified Tribunal Record at pp 293-294) the Applicant recounted two distinct conversations with his parents regarding the threats received by the NFL. It is only after the RPD questioned the Applicant about the date he started receiving actual threats that the Applicant discussed his parents' reaction to those threats. The Applicant described his parents' reaction as being "very scared" and "in shock" [translated]. The Court refers to the passage in question from the transcript:

**PRÉSIDENTE :** Vous aviez quoi? Dix-huit ans?

**DEMANDEUR :** J'avais, oui, à l'époque j'avais 18 ans.

**PRÉSIDENTE :** Vous en avez parlé à vos parents de vos problèmes?

**DEMANDEUR :** Oui. Donc à l'époque, donc, c'était pas des problèmes. Donc tout simplement j'ai parlé à mes parents : « Ah, vous savez quoi? Il y a des personnes qui

me parlent de politique, du FNL ». Et donc mon père disait : « (Inaudible) du FNL? Pourquoi ils te parlent? » Et tout. Bon, moi je disais, bon, ils me parlent. Il me demandait donc : « Est-ce qu'ils te menacent? Est-ce que tu vois qu'il y a des signes de t'impliquer dedans? » Etc. Et donc moi je disais, bon, ils me parlent tout simplement du FNL. Donc ils discutent entre eux en parlant du CNDD, du FNL. Donc ils discutent en tous cas et donc moi j'ai pas beaucoup de trucs à dire parce que j'ai pas – j'ai pas vraiment de connaissances dans ce domaine-là et... Donc ils ont pris ça à la légère quoi donc. Il n'y avait pas de menace, il y avait rien du tout. Donc ils étaient au courant de ça.

**PRÉSIDENTE:** Mais le 24 septembre, là c'était quand même assez sérieux. C'est le soir même qu'on vous avez appelé pour vous menacer.

**DEMANDEUR:** Oui, oui. Donc là, à partir...

**PRÉSIDENTE :** Vous en avez parlé à vos parents.

**DEMANDEUR :** Oui, oui.

**PRÉSIDENTE :** Et?

**DEMANDEUR:** Donc quand – donc après la fin de cet appel-là donc j'ai déjà – donc tout simplement donc j'ai parlé à mes parents. Je leur ai dit que je viens de recevoir un appel et que j'avais reconnu un des étudiants qui avaient – qui étudiaient avec moi. Et donc il me disait que simplement j'allais regretter ma décision parce que j'avais pas pris la carte du parti qu'il m'avait donnée.

**PRÉSIDENTE :** Quelle a été leur réaction ?

**DEMANDEUR :** Ils ont eu très peur. Il ont été choqués.

[34] The Court agrees with the Applicant that the RPD misconstrued the evidence provided in his testimony. It is clear in reading the transcript that the Applicant was attempting to recount his entire narrative to the RPD in his testimony, but was not given the chance to do so. In his testimony, the Applicant not only referred to the incident that occurred on September 24, 2010, but also to the events that occurred before he was threatened. It is only after being interrupted and questioned by the RPD with regard to the telephone threats of September 24, 2010, that the Applicant mentioned

his parents' reaction to those threats. Prior to this intervention by the RPD, the Applicant described his experience before the threats arose.

[35] Due to mischaracterization of fact based on confusion in respect of the Applicant's testimony, which led to the RPD's error of fact in its credibility findings, the Court does not find the decision is reasonable when assessed as a whole in context.

[36] The RPD relied primarily on this finding to justify its conclusion that the Applicant lacked credibility. The RPD undertook very little substantive analysis on the remainder of the evidence upon which the Applicant's claim of a well-founded fear relied, although the documentary evidence submitted by the Applicant reasonably supported his claim of fear from youth NFL members in Burundi.

[37] As stated by this Court in *Canada (Minister of Public Safety and Emergency Preparedness) v ElAttar*, 2013 FC 1012, "a reasonable result will not save a decision that is devoid of adequate reasons where there is a duty to give reasons and where the reasons cannot be augmented by regard to the record" (at para 10) (Reference is also made to *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431).

[38] Without further analysis of the other evidence on the record, the Court cannot find that the principles of *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 save the decision. Even if the RPD found some evidence not to be credible, it was required to continue go on to consider whether there remained a residuum

of reliable evidence to support a well-founded fear of persecution (*Joseph v Canada (Minister of Citizenship and Immigration)*, 2011 FC 548 at para 11). This is particularly true in the present case where the evidence found not credible was only related to peripheral issues.

[39] Given that this factor, in and of itself, is determinative of the matter, the Court does not see a need to address the other grounds raised by the Applicant.

#### X. Conclusion

[40] For all of the above-noted reasons, the Applicant's application for judicial review is allowed.

**JUDGMENT**

**THIS COURT ORDERS that** the Applicant's application for judicial review be granted and the matter be returned for determination anew (*de novo*) before a differently constituted panel with no question of general importance for certification.

"Michel M.J. Shore"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-12781-12

**STYLE OF CAUSE:** AIMÉ-LANDRY AHISHAKIYE v THE MINISTER OF  
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**PLACE OF HEARING:** TORONTO, ONTARIO

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